

Declarations of Inconsistency Under the New Zealand Bill of Rights Act 1990

By

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Introduction

Arthur William Taylor is a colourful character. He is a long-serving prison inmate with a string of successful legal challenges brought on behalf of himself and prison inmates. Self-styled “jailhouse lawyer”,¹ he has no legal qualifications, limited access to legal materials, and only two hours each day Monday-Thursday to prepare his cases.² Yet, Taylor has been remarkably successful in the cases he has brought, almost all of which he has argued in person.³ In 2009 the Inland Revenue Department assessed his taxable income at more than \$100,000 from court-awarded costs.⁴

This commentary examines one of Taylor’s cases decided by the Supreme Court in 2018. In *Attorney-General v Taylor*,⁵ the question was whether or not the courts have jurisdiction to grant declarations of inconsistency where legislation cannot be reconciled with a protected right under the New Zealand Bill of Rights Act 1990 (NZBORA). This was the first case in which the High Court had granted such a declaration,⁶ and the Attorney-General appealed against the decisions below that the Court was seized of jurisdiction.⁷ The case involved the Key Government’s statutory ban on a prisoner’s right to

¹ “Jailhouse lawyer” contracted into one word in his email address.

² Arthur Taylor letter to the writer, 9 December 2018. Taylor appeared before a parole board on 24 January 2019 and was granted parole with a release date in February 2019. Taylor had served 40 years in prison and had appeared before parole boards on 19 occasions without success.

³ For a sample of successful actions, see *Taylor v District Court at North Shore (No 2)* CIV-2009-404-2350, 13 October 2010; *Taylor v Chief Executive of Department of Corrections* [2010] NZCA 371, [2011] 1 NZLR 112; *Taylor v Manager of Auckland Prison* [2012] NZHC 1241; *Taylor v Manager of Auckland prison* [2012] NZHC 3591; *Taylor v Attorney-General* [2013] NZHC 1659; *Taylor v Attorney-General* [2014] NZHC 1630; *Taylor v Chief Executive of Department of Corrections* [2015] NZCA 477, [2015] NZAR 1648; *Taylor v Chief Executive of Department of Corrections* [2015] NZHC 2196; *Taylor v Witness C* [2017] NZHC 2610; *Harris v Taylor* [2018] NZCA 393; *Attorney-General v Taylor* [2018] NZSC 104.

⁴ “Career criminal earned six-figure income in prison” NZ Herald, 18 July 2010 (http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10659514).

⁵ *Attorney-General v Taylor* [2018] NZSC 104. This was one of two cases in the Supreme Court in 2018 brought by Taylor. See also *Ngaronoa v Attorney-General* [2018] NZSC 123.

⁶ *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791.

⁷ *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791; *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24;

vote in a general election.⁸ On appeal, it was common ground that the statutory ban was inconsistent with the right to vote affirmed in s 12(a) of the NZBORA.⁹

Two questions were set down for appeal: whether the Court of Appeal was correct to find that the High Court had jurisdiction to grant the declaration, and whether Taylor had standing to be a party to the proceeding. The Supreme Court by a majority of 3:2 dismissed the Attorney-General's appeal, and unanimously granted Taylor's cross-appeal on standing.¹⁰ The majority judgments are the joint judgment of Glazebrook and Ellen France JJ, and the judgment of Elias CJ. William Young and O'Regan JJ dissented in a joint judgment written by O'Regan J.

Majority judgments

The Attorney-General's two primary arguments focused on the scheme of the NZBORA and the nature of the judicial function. First, s 4 of the NZBORA (inconsistent legislation prevails) contemplates the enactment of statutes that the courts may consider are inconsistent with the protected rights or freedoms. It followed, the Attorney argued, that such legislation could not be treated as a breach of the NZBORA requiring remedy. Legislation inconsistent with the NZBORA does not breach the protected rights but rather changes their scope. Secondly, the Attorney argued that a declaration of inconsistency is an advisory opinion that falls outside the judicial function and the High Court's jurisdiction.¹¹ There was no dispute that the prisoners' voting ban was inconsistent with the NZBORA and no action can be taken in relation to the declaration. It determines no legal rights and conveys no consequences as between the parties.¹² No oral argument in the Supreme Court appears to have addressed the second question set down for appeal – that of Taylor's standing.

Each of the majority judgments endorsed the courts' commitment under the NZBORA to apply appropriate and effective remedies that can vindicate the protected rights. The judgments affirmed the pioneering approach in *Baigent*,¹³ where the Court of Appeal developed the novel remedy of public law compensation against the State for egregious breach of the NZBORA.¹⁴ The courts might draw upon the full range of remedial responses (including the remedy of declaration) and develop

⁸ Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 (NZ).

⁹ *Taylor v Attorney-General* [2018] NZSC 104 at [2], [73].

¹⁰ *Attorney-General v Taylor* [2018] NZSC 104.

¹¹ At [25].

¹² At [52].

¹³ *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent*].

¹⁴ *Attorney-General v Taylor* [2018] NZSC 104 at [30], [39] per Glazebrook and Ellen France JJ and [104] per Elias CJ.

new remedies where there is no existing remedy.¹⁵ Glazebrook and Ellen France JJ observed that the NZBORA is an Act to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights, art 2(3)(a) of which provides that states parties undertake to ensure those whose rights are violated "have an effective remedy".¹⁶ Their Honours added that, where legislation derogates from the NZBORA, the only effective remedy is a declaration of inconsistency.¹⁷ Elias CJ couched it as a matter of constitutional obligation.¹⁸ Section 3(a) states that the Act applies to each of the branches of government, including the judicial branch, which makes it a constitutional responsibility of the judiciary to declare legislative inconsistencies. No express statutory conferral of jurisdiction was required, her Honour held, "because such powers of declaration are within the inherent jurisdiction of the High Court".¹⁹

The majority dismissed the first argument of the Attorney-General as "over-ambitious".²⁰ The Attorney argued that there is no breach of rights when Parliament enacts inconsistent legislation as the legislation abridging the right changes its scope. The majority rejected this approach as being contrary to the scheme of the NZBORA and the fundamental nature of the protected rights. For Elias CJ, the NZBORA "occupies a position properly described as 'constitutional'".²¹ Her Honour held that the NZBORA was immune to amendment by a side wind and could not be accomplished by inconsistent legislation.²² Express legislative amendment of the NZBORA itself would be required to alter the scope of the protected rights.

The majority also gave short shrift to the Attorney-General's second argument, that a declaration of inconsistency is advisory only and not part of the judicial function of adjudication. Elias CJ benevolently described this suggestion as "over-broad".²³ A declaration of inconsistency is a formal and authoritative statement as to the effect of inconsistent legislation on individual rights,²⁴ and is vindication for a successful litigant whose rights are adversely affected.²⁵ The Attorney-General sought in vain to rely on the decision of the High Court of Australia in *Momcilovic v R*.²⁶ The High Court

¹⁵ At [30], [38]-[39], [104].

¹⁶ At [41] per Glazebrook and Ellen France JJ.

¹⁷ At [41].

¹⁸ At [117].

¹⁹ At [118].

²⁰ At [102] per Elias CJ.

²¹ At [102].

²² At [103].

²³ At [95].

²⁴ At [53] per Glazebrook and Ellen France JJ.

²⁵ At [101] per Elias CJ.

²⁶ *Momcilovic v R* [2011] HCA 34, (2011) 245 CLR 1.

held (3:2) that the granting of a declaration of inconsistency under s 36 of the Victorian Charter of Human Rights and Responsibilities 2006 was not a judicial function, which rendered s 36 in breach of the constitutional vesting of judicial power. Both majority judgments thought *Momcilovic* of limited relevance owing to Australia's "very different constitutional and legislative circumstances".²⁷ The constitutional separation of powers in Australia lacks any comparison under New Zealand's flexible constitutional arrangements.

Finally, the Court unanimously granted Taylor's cross-appeal on standing. For Glazebrook and Ellen France JJ, Taylor was sufficiently affected as the 2010 Amendment expressly continued the prohibition on voting for long-term prisoners.²⁸ The dissenting Judges, William Young and O'Regan JJ, agreed with Glazebrook and Ellen France JJ.²⁹ For Elias CJ, Taylor had a direct interest in how the Court decided the case as its decision would affect any claim he may subsequently bring seeking declaratory relief.³⁰ The Attorney's argument was of general application that declaratory relief is never available for legislative breach of the NZBORA.

Dissenting judgment

William Young and O'Regan JJ organised their dissent around a threshold distinction. They distinguished between an indication of inconsistency made in resolving a dispute requiring the application of ss 4-6 of the NZBORA, and a standalone claim for a declaration of inconsistency. The former were legitimate in resolving disputes involving the NZBORA, the latter were not. Indications of inconsistency do not purport to be a remedy for breach of the NZBORA but are a step in the court's reasoning to resolve a dispute before it.³¹ For the minority, a legislative inconsistency did not amount to a breach of the NZBORA for which the courts should fashion a civil remedy: "After all, s 4 [inconsistent legislation prevails] removes the only effective remedy from consideration."³²

²⁷ *Attorney-General v Taylor* [2018] NZSC 104 at [111] per Elias CJ. See also at [60]-[63] per Glazebrook and Ellen France JJ.

²⁸ At [69].

²⁹ At [145].

³⁰ At [120].

³¹ At [125].

³² At [131], [133].

Their Honours drew support from other jurisdictions where the Bill of Rights expressly authorises the granting of declarations of inconsistency.³³ The purpose of such declarations, they reasoned, is not to provide a remedy for breach but to draw the inconsistency to the legislature's attention with a view to prompting legislative reconsideration.³⁴ William Young and O'Regan JJ contrasted declarations of inconsistency under the NZBORA which, they reasoned, do not have legal consequences: they simply "hang in the air" and do nothing, with the consequential risk that a formal order of the court might be simply ignored.³⁵ Their Honours conceded the desirability of vindicating rights but disputed the efficacy of declarations of inconsistency.³⁶

"We ... query the extent to which a declaration provides vindication given that a declaration binds no-one in relation to future actions and has no impact on the victim's position."

Critique

A primary contention of the Crown reduced to an unattractive argument: that Parliament was not subject to the NZBORA.³⁷ The Attorney-General argued that inconsistent legislation does not breach the NZBORA but rather alters the scope of the protected right itself. This argument seeks to engraft a major exception to the text of s 3(a). This provision recites, in unequivocal language, that the NZBORA applies to each of the three branches of government, including the legislative branch. Self-evidently, legislation is a function of the legislative branch.

In essence, the Crown's argument engaged the doctrine of *pro tanto* implied repeal (inconsistent legislation amends the NZBORA by implication). The Chief Justice dismissed this argument as denying the fundamental nature of the protected rights. Of particular interest are her Honour's rulings that: (1) the NZBORA is a *constitutional* statute,³⁸ and (2) express legislative amendment of the NZBORA is required to alter the scope of a protected right.³⁹ These rulings endorse sub silentio the landmark

³³ At [127], citing the Human Rights Act 1998 (UK), the European Convention on Human Rights Act 2003 (Republic of Ireland), the Human Rights Act 2004 (ACT) and the Charter of Human Rights and Responsibilities Act 2006 (Vic).

³⁴ European Convention on Human Rights Act 2003 (Republic of Ireland), s 5(3); Human Rights Act 2004 (ACT), ss 32(4) and 33; Charter of Human Rights and Responsibilities Act 2006 (Vic), s 36(6)(7).

³⁵ *Attorney-General v Taylor* [2018] NZSC 104 at [134].

³⁶ At [139].

³⁷ There is no question that the NZBORA applies to and controls Parliament's non-legislative activities and operations. See for example *Police v Beggs* [1999] 3 NZLR 615 (HC) (the Speaker of the House of Representatives could not invoke an occupier's rights under the Trespass Act 1980 in a manner that unreasonably deprived persons of their rights of political protest and assembly under the NZBORA).

³⁸ *Attorney-General v Taylor* [2018] NZSC 104 at [102].

³⁹ At [103].

decision in *Thoburn v Sunderland City Council*,⁴⁰ where Laws LJ recast the boundaries of implied repeal. Constitutional or human rights statutes were immune from implied amendment or repeal. “Ordinary statutes may be impliedly repealed,” Laws LJ declared: “Constitutional statutes may not.”⁴¹ *Thoburn* rejected the formalist legal method of implied repeal (later statutes in time prevail) in preference for a substantive method of reconciling legislation that accords primacy to constitutional and human rights statutes.

Elias CJ’s rulings are immensely important for New Zealand public law. *Thoburn* has never been followed in the New Zealand courts but now there is an equivalent precedent. It is fitting to place the reasoning of *Thoburn* and the Chief Justice in broader perspective:⁴²

“The ruling in *Thoburn* completes what had been building in the English and New Zealand courts. Recent decisions had acknowledged that Parliament could override fundamental rights but only by using emphatic language. In a series of decisions, the courts had refused to allow general or ambiguous legislation to override or abrogate common law rights. Laws LJ’s contribution was in linking the doctrine of implied repeal to the common law rights movement. Its redefined scope made explicit the responsibility of the political branch when legislating in the field of constitutional or human rights. Parliament might abrogate rights but only through targeted language that would demand public explanation. For Lord Hoffmann: ‘Parliament must squarely confront what it is doing and accept the political cost’. The principle of legality demanded no less.”

The contention of the dissenting judges that a declaration of inconsistency is not a remedy (and certainly not an effective remedy) is tenuous at best. The assumption is that, to be a remedy, it must be *effective*, meaning that some consequential relief must be available. A declaration of inconsistency would “simply hang in the air” with no legal consequences, and would be no remedy at all.⁴³ On the contrary, a declaration of inconsistency *does* have legal consequences. It is a formal and authoritative pronouncement of the effect of inconsistent legislation on the rights of individuals, and it operates to vindicate the rights themselves. Rights have value, even if inconsistent legislation may override them

⁴⁰ *Thoburn v Sunderland City Council* [2002] EWHC 195 (admin), [2003] QB 151.

⁴¹ At [63]. For analysis, see G Marshall “Metric Measures and Martyrdom by Henry VIII Clause” (2002) 118 LQR 493; PA Joseph “Constitutional Law” [2002] NZ Law Rev 387 at 416-420; PA Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [15.4.6(2)].

⁴² PA Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [15.4.6(2)] (footnotes omitted). The dictum of Lord Hoffmann is from *R v Secretary of State for the Home Department, ex parte Simms* [2002] 2 AC 115 (HL) at 131.

⁴³ *Attorney-General v Taylor* [2018] NZSC 104 at [134].

(s 4). Moreover, not all remedies contemplate consequential relief. Under New Zealand's Declaratory Judgments Act 1908, binding declarations of right may be made whether or not consequential relief is or could be claimed.⁴⁴

Finally, the Court held unanimously that Taylor had standing to be a party to the action. This answered the second question on which leave to appeal was granted. Curiously, no question of Taylor's standing was raised by the Crown in either of the courts below.⁴⁵ The Court of Appeal, without hearing argument, held that Taylor lacked standing. Ruling on a matter that was not in issue and on which the Court did not seek submissions is an unexplained breach of Taylor's right to the protection of natural justice.⁴⁶ He was "not heard" on an issue that, for him, was determinative of the case (subject to his right to apply for leave to appeal). A redeeming feature of the Supreme Court's decision was that all five judges reversed the Court of Appeal's decision on standing.

Comment

The dissenting Judges can be commended for their candour. *Taylor* was not an open and shut case but one that turned on the "better view".⁴⁷ The decision might have gone either way, depending on the judicial predisposition: the majority Judges took an expansive view of the judicial role, the dissenting Judges a narrow view. How the respective views broke down predetermined the outcome of the case.

If predisposition be the determinant, then this commentator plumps for the majority view and the expansive role of courts under the NZBORA. Declarations of inconsistency perform dual public functions in addition to the vindication of victims' rights: they promote the concept of "dialogue" and the interdependence of the political and judicial branches,⁴⁸ and they contribute to a robust rights culture. Rights derogations should be the subject of open and informed debate in which the courts have a role to play. Encouraging that role through declarations of inconsistency does not challenge the constitutional architecture or existing balance between courts and legislature. Parliamentary sovereignty remains on its pedestal (inconsistent legislation prevails notwithstanding the NZBORA)

⁴⁴ Declaratory Judgments Act 1908 (NZ), s 2.

⁴⁵ *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791; *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24. For acknowledgement see *Attorney-General v Taylor* [2018] NZSC 104 at [17], [68].

⁴⁶ Both at common law and under the NZBORA, s 27(1).

⁴⁷ *Attorney-General v Taylor* [2018] NZSC 104 at [122].

⁴⁸ For political-judicial dialogue, see PA Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [21.2.5]. For the interdependence of the political and judicial branches, see PA Joseph "Parliament, the Courts, and the Collaborative Enterprise" (2004) 15 KCLJ 321.

but is no longer beyond reproach. Parliament is held to account for its legislation whenever the courts formally declare that it has legislated in breach of protected rights. Declarations of inconsistency under the NZBORA inform the equilibrium that maintains the constitutional balance between the political and judicial branches.

It seems almost incongruous today to doubt the inherent jurisdiction of the High Court to grant declarations aimed at highlighting rights-departures. Declaratory relief is part of the judicial armoury. In *Burt v Governor-General*,⁴⁹ the Court of Appeal struck out an application for judicial review under the Judicature Amendment Act 1972 (NZ), as there was no purported exercise of a statutory power or statutory power of decision (as required under that Act). The applicant had challenged the refusal of the Governor-General to exercise the Royal prerogative of mercy. The Court did not treat the non-statutory nature of the prerogative as fatal, as the appeal might be transformed into “a simple action for a declaration, which has very wide scope in the 20th century”.⁵⁰ One of the major judicial achievements last century was the honing of the remedy of declaration to escape the constraints that checked the scope of the prerogative remedies (certiorari and prohibition).⁵¹ Declaratory relief would issue notwithstanding decision-makers were under no duty to act judicially, and no rights of a justiciable nature were affected.⁵² The remedy gave courts the flexibility to achieve administrative justice in ways that were not previously possible. Given these macro-developments in administrative law, the 3:2 split in *Taylor* shows that judicial predisposition is never far beneath the surface in public law adjudication.

Concluding comment

Access to justice has value in its own right. A long-serving prison inmate helped resolve an important question of public law. It was a question that had remained unsettled for considerable time, with doubts over the High Court’s jurisdiction arising shortly after the enactment of the NZBORA.⁵³ In 2010 one Judge remarked that it was “curious” no New Zealand court had issued a declaration of inconsistency.⁵⁴ Arthur Taylor did a service in resolving this long-standing issue of public law. The New

⁴⁹ *Burt v Governor-General* [1992] 3 NZLR 672 (CA).

⁵⁰ At 676.

⁵¹ See PA Joseph “False dichotomies in Administrative Law: From There to Here” [2016] NZ L Rev 127 at 131-134.

⁵² Contrast *The King v Electricity Commissioners, ex parte London Electricity Joint Committee Company (1020) Ltd* [1924] 1 KB 171 (CA) at 205 per Atkin LJ apropos certiorari and prohibition.

⁵³ See *Temese v Police* (1992) 9 CRNZ 425 (CA) at 427.

⁵⁴ *Wool Board Disestablishment Co Ltd v Saxmere Co Ltd* [2010] NZCA 513, [2011] 2 NZLR 442 at [140] per Hammond J.

Zealand courts should be complimented for openly availing their services, notwithstanding a person's predicament. Prison inmates, too, have standing.

